

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ADRIAN THOMAS,

Plaintiff,

-v- 17-cv-626

ADAM R. MASON, ET AL.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DANIEL J. STEWART
December 5, 2022
445 Broadway, Albany, New York

FOR THE PLAINTIFF:

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1 COURT CLERK: Monday, December 5th, 2022,
2 11:02 a.m. The case -- you want to do one case?

3 THE COURT: Do Thomas.

4 COURT CLERK: The case is Adrian Thomas versus
5 Adam R. Mason and others, case number 17-cv-626.

6 Appearances for the record, please.

7 MR. KLEIN: Brett Klein, for the plaintiff.
8 Good morning, Judge.

9 THE COURT: Good morning, Mr. Klein.

10 MR. FIRTH: Good morning, your Honor. William
11 Firth, on behalf of Dr. Sikirica.

12 THE COURT: Good morning to you.

13 MR. GINSBERG: Michael Ginsberg for Pattison,
14 Sampson, Ginsberg and Griffin, for the City of Troy and
15 the police officer defendants.

16 MS. GIFFORD: Rhiannon Gifford, Pattison,
17 Sampson, Ginsberg and Griffin, on behalf of Adam R.
18 Mason, Ronald Fountain and Tim Colaneri.

19 THE COURT: All right. Thank you. Rhiannon,
20 if I call your Rhiannon Spencer, I apologize in advance.

21 MS. GIFFORD: I understand. I still call
22 myself the wrong name.

23 THE COURT: So what we are going to do -- I
24 want to have oral argument on both of these cases; we
25 will do Thomas first. After we're done with Thomas, I'm

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1 going to take a little break and talk with my chambers,
2 and we will come back out and we will do the second
3 case.

4 So, with regard to Adrian Thomas, we have got
5 two motions for summary judgment, one on behalf of the
6 City defendants and one on behalf of Dr. Sikirica.

7 So, why don't I have the City defendants go
8 first if they wish.

9 MR. GINSBERG: Thank you, your Honor. If it's
10 acceptable to the Court, I would just like to make a
11 quick comment or statement about this matter, and then
12 Ms. Gifford -- I had to make a note in my notes as well
13 not to refer to her as Spencer -- then Miss Gifford will
14 address the matters in detail if that's acceptable to
15 the Court.

16 THE COURT: I have no objection to that.

17 MR. GINSBERG: Your Honor, in this matter, the
18 Thomas matter, the plaintiff has failed to demonstrate
19 the existence of genuine issue of material facts so as
20 to avoid summary judgment. I think it's important to
21 point out to the Court that with regard to violation of
22 the right to a fair trial or with regard to any other
23 right on the basis of the involuntary confession as
24 determined by the Court of Appeals, we can't ignore the
25 applicable standard.

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1 The standard is whether a reasonable police
2 officer in the same position would have understood that
3 their conduct was in violation of law. We can't hold
4 the officers to a higher standard than the standard that
5 we hold the learned judges of the appellate division or
6 the trial judge to. Those judges ruled that the
7 techniques used by the officer defendants in obtaining a
8 confession were not in violation of law.

9 How could the officers understand more than
10 the judges?

11 THE COURT: Well, it was clearly established
12 at the time, however, that the police could not rely
13 upon the coerced confession in order to make a probable
14 cause determination. Correct?

15 MR. GINSBERG: Not at the time that it was
16 taken and certainly not --

17 THE COURT: That was the state of the law,
18 right? Back in -- trying to remember. I'm sure I have
19 it. So 2008 -- September of 2008 the state of the law
20 was the police couldn't rely on a coerced confession in
21 order to establish probable cause for a prosecution.

22 MR. GINSBERG: On a coerced confession, yes,
23 your Honor. But what constituted a coerced confession
24 is what was at issue, and neither the officers at that
25 time nor the trial judge nor the five members of the

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1 panel at the appellate division considered the conduct
2 of the officers and techniques used to be a violation of
3 law to be coercive.

4 It wasn't until the Court of Appeals addressed
5 that issue and essentially rendered new law on that
6 matter in regard to the totality of the circumstances
7 and the techniques that were used. So at the time that
8 those techniques were used, it was not settled law that
9 that constituted coercion.

10 THE COURT: Well, are you conceding, then, for
11 purpose of the motion, that the confession was coerced?

12 MR. GINSBERG: Not at the time that it was
13 taken.

14 THE COURT: I mean as we sit here today, are
15 you conceding that this was a coerced confession?

16 MR. GINSBERG: We concede that the Court of
17 Appeals determined that the techniques used in totality
18 constituted coercive behavior but only because it was
19 addressed at that time by the Court of Appeals and the
20 law then changed.

21 THE COURT: Well, I mean, they relied upon
22 cases, Supreme Court cases that predated this event in
23 coming to their conclusion. But what I'm trying to
24 figure out, because the plaintiff's counsel has made an
25 argument that the -- that you're collaterally estopped

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1 from arguing that the confession was not coerced. And I
2 understand what you're saying is the Court of Appeals
3 made the determination that they -- they made it also on
4 the basis of state law as well.

5 So, for purposes of -- if we have a trial in
6 this case, is one of the issues is going to be presented
7 at the trial as to whether this -- this confession was
8 coerced, are you conceding that it was coerced?

9 MR. GINSBERG: Your Honor, we don't believe
10 that that's the inquiry that should be made here. The
11 inquiry that should be made is whether or not the
12 officers at the time knew that the techniques and
13 behavior that they engaged in was in violation of law.

14 There was no way that they could have known
15 that because the judges who addressed the issues didn't
16 know it. We can't hold the officers to a higher
17 standard. So, yes, while perhaps ultimately the courts
18 determined that it was coercive, the officers did not
19 know and had no reason to believe that it was coercive
20 conduct at the time that they engaged in it and
21 therefore it cannot constitute a constitutional
22 violation.

23 THE COURT: Wasn't there a Second Circuit
24 precedent about withholding medical cases of two
25 brothers with withholding medical treatment for the one

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1 brother in order to get the other brother to confess to
2 the possession of the gun, they ruled that was
3 unconstitutional? Isn't that a similar-type case?

4 MR. GINSBERG: I don't believe so because no
5 medical attention was withheld here.

6 THE COURT: Well, yeah, but the theory here is
7 that they're going to -- you know, Mr. Thomas, in
8 telling him you have to do this or else your child is
9 going to die and, therefore, that's why it's
10 involuntary.

11 MR. GINSBERG: I believe what Mr. Thomas was
12 told by the officers was if you tell us what happened,
13 then the medical personnel will be in a better position
14 to help your son.

15 THE COURT: Right.

16 MR. GINSBERG: Not that they wouldn't provide
17 any medical attention to him unless he rendered a
18 confession. I think that those are completely separate
19 issues.

20 THE COURT: Okay.

21 MR. GINSBERG: And Miss Gifford will address
22 the -- the particulars in more detail, your Honor.

23 THE COURT: All right.

24 MS. GIFFORD: I think the crux of the analysis
25 for the qualified immunity issue is really at what level

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1 of generality does the Court define the relevant legal
2 right here. And as you state, it is generally known
3 that a coerced confession cannot be used against a
4 defendant in a criminal trial.

5 THE COURT: Let me start there, then. Okay?
6 Assume for the moment that we extract the confession
7 from the probable cause analysis. Was there probable
8 cause to arrest Mr. Thomas or prosecute Mr. Thomas in
9 the absence of that confession?

10 MS. GIFFORD: Yes, I do believe there was.
11 There was significant evidence prior to the police even
12 being involved where the doctors at Albany Medical
13 Center stated that it was suspicious causes to the
14 injuries, that they are injuries that are typically only
15 found in acceleration and deceleration matters, shaking
16 of a child. That raises a question as to what occurred
17 in questioning of the parents and individuals who had
18 access to the child is incredibly relevant.

19 And at that point, the children who were also
20 residing at the Thomas household were brought into this
21 CPS interview rooms and questioned. During those
22 questioning, I believe one of the older children, India
23 Thomas, stated that she personally saw Mr. Thomas get
24 angry with the child and shake him and put him down in
25 the bed and his head hit the crib and his head hit the

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1 mattress.

2 There were reports that Mr. Thomas utilized
3 a stick to prop open a window to hit the top of the
4 children's head. There was the subsequent confession
5 prior to the grand jury indictment where Mr. Thomas
6 admitted to throwing the children to the bed to -- onto
7 the bed to the CPS workers.

8 THE COURT: How long after -- when did
9 that confession occur vis-a-vis the confession which the
10 Court of Appeals found was coerced?

11 MS. GIFFORD: The confession to the CPS
12 workers was two days before the grand jury presentation,
13 and that was on the 26th. So it was on or about the --
14 September 24th, 2008, which was the day after the
15 confession with the police officers.

16 THE COURT: So it's your position that
17 whatever obtained was caused by that improper
18 questioning, that that's somehow dissipated in that
19 period of time?

20 MS. GIFFORD: Yes. That is the position, and
21 that he -- the statements made are properly considered
22 as far as the probable cause analysis at the time. At
23 the time, there was no indication that the confession
24 was indeed coerced, and the additional statements made
25 by Mr. Thomas to the CPS workers who did not have

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1 knowledge -- who stated they did not have knowledge of
2 any prior confession to the police and that they were
3 just doing their due diligence pursuant to CPS
4 investigations when Mr. Thomas made those incriminating
5 statements for a second time to them.

6 He made incriminating statements that almost
7 kind of were a little different than what he had said to
8 the police but still corroborated the statements of
9 throwing the child onto the bed, the same kind of
10 actions that Dr. Edge and Dr. Waldman had said at the
11 hospital were indicative of acceleration, deceleration
12 injuries and that Dr. Edge said that this was a homicide
13 in his opinion. While not necessarily accurate maybe,
14 but that was his opinion at the time he was assessing
15 the children before the police.

16 THE COURT: He denies ever making that
17 statement, correct?

18 MS. GIFFORD: He did deny saying that.
19 Correct. All of the police records and notes taken
20 contemporaneously during the investigation contained
21 notes of that nature. Dr. Edge was deposed in 2015,
22 many years after the incident. I think the
23 contemporaneously made notes are indicative of --

24 THE COURT: That becomes a question of fact.

25 MS. GIFFORD: Potentially.

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1 THE COURT: Okay. All right.

2 MS. GIFFORD: Turning to the -- continuing
3 with qualified immunity analysis, though, the rights
4 needs to be clearly established. The contours of the
5 rights needs to be clearly established based upon the
6 existence of current law. Here, as the innocence that
7 were repeatedly stated throughout their briefs,
8 the Court of Appeals were in a unique position to
9 finally address and create bright-line rules with regard
10 to the techniques used by police officers
11 in interrogating and interviewing and that's so because
12 at that time, when the police were interviewing
13 Mr. Thomas in 2008, there were no bright-line rules.
14 There was no out-of-contour define and there was no
15 ability to the police to be able to reject what they had
16 been taught.

17 The innocence network had even acknowledged
18 that this was a proper time to address what the police
19 are taught and what they have been learning at police
20 academies across the state. These were the common
21 practices and the techniques used in 2008, and they
22 weren't rejected or questioned until it was brought up
23 on this case in 2015, many years after the techniques
24 were utilized.

25 And even if we were to, you know, say that the

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1 rule was clearly established and the contours of the
2 rule were defined, there's still the alternative basis
3 for qualified immunity, which was that it was
4 objectively reasonable to believe the techniques were
5 permissible under settled principles.

6 You mentioned when you were speaking with
7 Mr. Ginsberg that the Court of Appeals relied upon
8 Supreme Court cases in New York State to render their
9 determination, but those Supreme Court cases were not on
10 point with what the Court was analyzing in the Thomas
11 decision. Those Supreme Court cases -- I believe it was
12 Abonds (phonetic) and Garrity, they related to an
13 individual's right to seek jobs and to apply for
14 government positions.

15 And in one of the cases, the Court held that
16 it was improper to force the employee to testify at the
17 grand jury because he could lose his right to bid on
18 contracts later on in the process.

19 THE COURT: Right.

20 MS. GIFFORD: That's not any of the scenarios
21 here. That's --

22 THE COURT: It goes to the issue of
23 voluntariness. In other words, the Garrity warnings
24 generally in employment cases go to the issue of whether
25 or not the statements are voluntary. But you've relied

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1 and Mr. Ginsberg pointed out, you know, the decisions of
2 the Appellate Division as a basis for qualified immunity
3 and generally, you know, we look to what's clearly
4 established federal law. We don't necessarily look to
5 what a state court has determined or not determined.

6 So, wasn't it clearly established by the
7 Second Circuit that at least on a basic level that the
8 police could not falsify evidence and use that to
9 prosecute an individual, correct?

10 MS. GIFFORD: Yes. That level of generality
11 was defined at that time. I believe that we're not
12 dealing with a falsified confession here.

13 THE COURT: That's what the plaintiff is
14 maintaining. In other words, I understand there's a
15 difference between something that's coerced and
16 something that's falsified. So theoretically you could
17 have a coerced confession that's not falsified and also
18 the possibility exists it could be a coerced confession
19 that is falsified.

20 MS. GIFFORD: Correct. And in this case, we
21 do not have a identified coerced confession that was
22 falsified. The cases where they have identified a
23 falsified confession were instances where the criminal
24 defendants stated I never made those statements. I was
25 not -- I didn't say that I had no gun on me, I didn't

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1 have drugs on me, they made that up.

2 THE COURT: Right. I absolutely agree with
3 you. That's one possibility, where the police basically
4 write the whole statement, forge the person's signature
5 and says this is his confession. Obviously that's
6 unconstitutional.

7 MS. GIFFORD: Yes.

8 THE COURT: But what -- you know, what if they
9 go in and basically hold a gun to the person's head and
10 basically say we need you to confess to owning the drugs
11 and the person says okay, I'll write this down? He
12 wrote it down. It's not the police manufactured it but
13 they manufactured in a sense that they coerced it.

14 MS. GIFFORD: I would disagree and say that I
15 think the police did manufacture the confession in that
16 scenario that you presented because they are forcing the
17 individual by a threat of violence to adopt and make
18 statements that he never made or agreed to make.

19 Here, they -- the officers were sitting with
20 Mr. Thomas and having a conversation and then he agreed
21 to -- and made the statements himself and never stated
22 that there was conduct that was performed by the police
23 officers outside the confines of the recorded interview.

24 Each of the tactics and techniques that were
25 utilized by the police in this scenario were available

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1 for review by the trial court judge and the Third
2 Department when they determined that the techniques used
3 were not so coercive or inappropriate to vitiate the
4 voluntariness of the confession.

5 In a scenario where the officers are holding a
6 gun to the individual's head, we obviously know that his
7 statements are not being made voluntarily because maybe
8 here the police determined -- or the Court of Appeals
9 determined that the totality amounted to a kind of
10 coercive technique but doesn't necessarily mean for --
11 and I submit that means it does not mean that at all,
12 that the police knew that those statements made by
13 Mr. Thomas and adopted by Mr. Thomas were in fact false.

14 When a cop is holding a gun to an individual,
15 it's pretty apparent, I think, that those statements
16 cannot be reliable at all.

17 THE COURT: Isn't that kind of what the Court
18 of Appeals was saying? In other words, each of the
19 statements that was elicited were statements that were
20 fed to Mr. Thomas and that, coupled with his mental
21 health status, coupled with the threat to his wife to
22 prosecute her, the threat with, you know, the -- the
23 threat with regard to the fact that the child wasn't
24 going to get proper medical attention unless he's -- you
25 know, his memory was -- got better, whatever the phrase

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1 is that they used -- I know it's not a gun to the head
2 but isn't it along the same lines you're basically
3 feeding that information to the person, trying to coerce
4 them to agree with it so they can close the case?

5 MS. GIFFORD: At that time, the police
6 officers were not aware -- there was no settled case law
7 that those techniques were inherently coercive to
8 overcome his voluntariness of the statement -- of the
9 statements.

10 Here, you know, ultimately the Court of
11 Appeals took a broader look and had the opportunity and
12 benefit of time to see that, you know, actually the
13 techniques that have been in use and permissible all the
14 way up until 2015 when they made the decision actually
15 maybe aren't as voluntary as we had always been holding
16 or acknowledging.

17 THE COURT: Well, you're relying on the state
18 court case. So, there may be federal -- I mean -- my
19 responsibility is to determine what the state of law
20 federally was at the time, not necessarily what the
21 appellate definition concluded at the time.

22 I'm just wondering whether or not a more
23 prudent thing would be to have a jury make a
24 determination as to whether it was coerced, whether --
25 how it was coerced, and then make a determination as to

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1 qualified immunity at that point in time once you have
2 that specific information because obviously plaintiff's
3 counsel is taking a different view with regard to the
4 level of misconduct of the pleas, and I'm wondering if
5 it creates a question of fact.

6 MS. GIFFORD: I submit it does not create a
7 question of fact. There is no federal court precedent
8 at least that I'm aware of or that I believe the
9 plaintiff argued or pointed to that did set forth the
10 bright-line or have a sufficient contour of the rule to
11 make it so that our officers at the time in 2018 were
12 aware that their techniques were in fact coercive and
13 potentially violation of Mr. Thomas's constitutional
14 rights.

15 I think the analysis is important to consider
16 the Third Department in the Huntley hearing and
17 what cases the Court of Appeals relied upon in the state
18 cases because those were relevant to how the police
19 understood what techniques were permissible. From my
20 knowledge and at least I haven't seen or recall any
21 arguments to the contrary from the plaintiff's side
22 relying upon federal cases to overcome that.

23 THE COURT: Okay. As far as the Huntley
24 hearing goes, obviously your position is once the judge
25 makes a determination to admit the statement, that's an

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1 intervening superseding cause which cuts off all
2 liability, correct?

3 MS. GIFFORD: Correct. That's the argument as
4 far as the causation element, and I think that the
5 prosecutor's decision to do -- to rely upon and admit
6 the confession and the portions of the reporting I
7 believe at the trial also overcomes and eliminates the
8 causation in this matter because they all made
9 independent judgment to admit and rely upon this
10 confession.

11 THE COURT: Well, really comes down under
12 Townes, it comes down to what the judge makes an
13 independent determination. So you -- I don't have it in
14 front of me but do you know at what point in time that
15 the Huntley hearing was made to allow it to come in?

16 MS. GIFFORD: I did not write the date. I
17 apologize.

18 THE COURT: That's all right. Obviously it's
19 sometime between September 2008 when the -- when the
20 matter went to trial in -- it was indicted
21 September 26th. So October of 2009 was the trial.
22 Okay. So you're looking at a year and a month.

23 MS. GIFFORD: I'm sorry?

24 THE COURT: I just said you're looking at a
25 year and a month. In other words, under that scenario,

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1 assuming that there was a constitutional violation, the
2 state defendants would be responsible for his
3 incarceration for a year and a month up until the time
4 that the -- it was admitted into evidence at which point
5 in time that's basically on the judge for allowing it to
6 come in.

7 MS. GIFFORD: I would dispute that in that
8 other probable cause existed to prosecute absent the
9 confession.

10 THE COURT: Okay.

11 MS. GIFFORD: So that confinement was still
12 legal and justified based upon the additional probable
13 cause.

14 THE COURT: Okay.

15 MS. GIFFORD: That was available.

16 THE COURT: All right. Let me just check and
17 see if I had any other questions for you. I think
18 that's it.

19 MS. GIFFORD: Okay. Thank you, your Honor.

20 THE COURT: All right. Let me hear from the
21 county defendants at this point in time.

22 MR. FIRTH: Your Honor, good morning.

23 THE COURT: Good morning.

24 MR. FIRTH: I have the pleasure of being
25 before you on both cases today due to -- Crystal

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1 unfortunately had a family member pass away.

2 THE COURT: Okay.

3 MR. FIRTH: So I am here in her place instead.

4 THE COURT: All right.

5 MR. FIRTH: If I'm -- go ahead, your Honor.

6 THE COURT: You can go ahead. I understand
7 your situation.

8 MR. FIRTH: To that point, I was going to say
9 if I'm not able to field some of your more difficult
10 questions, then that's kind of my "get out of jail free"
11 card.

12 THE COURT: Okay. Well, tell me what your
13 position is with regard to the county defendants and, in
14 particular, Dr. Sikirica.

15 MR. FIRTH: Yes, Judge, so I think the -- the
16 primary thing to keep in mind here from our perspective
17 is that we're dealing with a grand jury indictment.
18 Okay? So we have a presumption of probable cause.

19 Plaintiff is required in that situation then
20 to come up with some evidence on the part of
21 Dr. Sikirica showing that he engaged in perjury or
22 suppression of evidence or fraud and were some type of
23 other bad faith conduct on his part and that just has
24 not been done.

25 Crystal articulated it best in her memorandum

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1 of law in this case. This comes down to a disagreement
2 of eight medical experts, doctors, in terms of the
3 interpretation of the objective findings on autopsy.
4 All agree essentially that M.T. suffered from subdural
5 hematoma and hemorrhaging as a result of trauma.

6 And to draw a parallel here, whether it's
7 appropriate or not, plaintiff argued just as he does in
8 the Davis case that the omission of the particular word
9 or a very collateral issue constitutes the suppression
10 of evidence; in this case, it's the condition of sepsis.
11 Even plaintiff's experts, the criminal -- the criminal
12 defendants' experts agree that the autopsy report very
13 sufficiently identified the condition of sepsis.

14 If anything, Dr. Sikirica would be guilty of
15 being overly verbose in his report, describing the
16 condition itself instead of just stating the work. So,
17 you know -- and, regardless, the prosecution was aware
18 that M.T. had sepsis. The criminal defendants' team was
19 well aware of the septic condition. Everyone was well
20 aware. It was heavily discussed, heavily litigated in
21 both trials And during the grand jury proceeding
22 Dr. Sikirica tested [sic] consistently.

23 There's just no question that sepsis was
24 present as a condition. So, really, a nonissue for
25 purposes of this motion.

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1 You know, and plaintiff also talks about
2 Dr. Sikirica's consideration, I believe he does, of
3 the inculpatory statement of Mr. Thomas, but
4 Dr. Sikirica is neither law enforcement or an officer of
5 the court. He's entitled to consider all facts
6 surrounding the manner of death and, in fact, he's
7 charged to do that under county law. That's exactly
8 what he did in this case.

9 THE COURT: Any problem with the police
10 sitting in on the autopsy?

11 MR. FIRTH: No, Judge. Plaintiff's only
12 doctors testified that's appropriate.

13 THE COURT: Any constitutional violation for
14 disclosing the statements or confession as we referred
15 it to here of the plaintiff to Dr. Sikirica?

16 MR. FIRTH: On the part of the -- of the city
17 defendants?

18 THE COURT: Right.

19 MR. FIRTH: I don't think so, Judge.

20 THE COURT: Okay. Well, let me ask you.

21 MR. FIRTH: I mean --

22 THE COURT: You know, if you have a
23 pathologist who altered their findings in order to
24 comport with the police investigation where the outcome --
25 where the police wanted to and intentionally did that,

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1 that would be a constitution violation, correct?

2 MR. FIRTH: I would agree that it's
3 intentionally --

4 THE COURT: And that would get over
5 the presumption of normalcy or whatever the grand jury
6 indictment gets over because you could say it's
7 fraudulent or false.

8 MR. FIRTH: Tend to agree with you, Judge.
9 Certainly that's not what happened in this case.

10 THE COURT: That's your position, is that this
11 is a dispute with regard to their analysis and what --
12 initial cause of death that he listed was what? I mean,
13 he mentioned sepsis but the cause of death was
14 blunt-force trauma, correct?

15 MR. FIRTH: Yes, Judge. That is correct.

16 THE COURT: All right. So Dr. Waldron, Jenny
17 and Dr. Baden agree with that, right?

18 MR. FIRTH: That is correct.

19 THE COURT: Dr. Klein doesn't know,
20 Dr. Maloney disagrees and Dr. Seema (phonetic)?

21 MR. FIRTH: Leestma.

22 THE COURT: Okay. Leestma indicates it was
23 trauma but really it was sepsis.

24 MR. FIRTH: She agrees it was trauma, just
25 secondary to sepsis. Right.

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1 THE COURT: Okay.

2 MR. FIRTH: Your Honor, yes. Again, it's --
3 it's really just a case of, you know, Dr. Sikirica's
4 medical opinion through his extensive education and
5 experience conducting over 10,000 autopsies, this was
6 his opinion. And some doctors agree with him. At the
7 very least this is qualified immunity.

8 THE COURT: All right. Thank you.

9 MR. FIRTH: Thank you, your Honor.

10 THE COURT: All right. Mr. Klein.

11 MR. KLEIN: Thank you, Judge. Thank you,
12 Counsel.

13 Your Honor, I guess I'm not going to go
14 through the whole brief, which we rely on and reiterate.
15 But to touch on a few things. Adrian Thomas -- this
16 case does not involve any crime; I think that's what
17 makes this significant.

18 Looking at the case at this stage of the
19 proceeding, I think that the defendants kind of gloss
20 over the fact that is not a case where there was a crime
21 and it's just a -- a disputed -- as to who committed a
22 crime. This is a case where in the light most favorable
23 to Mr. Thomas, there was no crime.

24 This is a child who died of natural causes,
25 who was septic, fever, vomiting, et cetera, for two days

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1 before he was found unresponsive, and other than
2 Dr. Sikirica and the defendants, there was no evidence
3 linking Adrian Thomas to any purported time, which is a
4 disputed fact. So I think --

5 THE COURT: There was -- you know, as you
6 pointed out, I mean, all these cases have a particular
7 narrative but here it seems like -- based upon what I
8 have read here, that there was an inquiry and the
9 concern by Dr. Edge with regard to what happened here,
10 he alerted the authorities with regard to that. He may
11 have been incorrect with regard to his assessment but
12 that's what started the ball rolling, it seems to me.

13 MR. KLEIN: Right. And they -- these are all
14 going to be credibility issues as to what we allege
15 through our -- what we intend to prove at trial through
16 our expert in coerced false confessions, whose testimony
17 in evidence before Your Honor and through our
18 pathologist, that this incorrect information is very
19 frequently how a -- what's referred to as a bias cascade
20 starts with law enforcement going down a road that
21 results in law enforcement doing what they did in this
22 case and what the Court of Appeals found was a -- a
23 clear -- a flagrant violation of due process to get the
24 result that they want. And this is a phenomenon that
25 occurs unfortunately in other cases and it occurred

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1 here.

2 So even with that flawed information, there
3 was no evidence linking Mr. Thomas to an acceleration or
4 deceleration injury. It was the police who then made a
5 conscious choice to interrogate Mr. Thomas for two
6 hours, getting nothing but denials and credible and
7 consistent unawareness of any information that would
8 have led -- would have explained how the child died.

9 Giving a coerced statement that the Court of
10 Appeals found at the first two-hour session was part of
11 this larger coerced confession.

12 And the -- the officers conceding that the
13 information he gave didn't give them probable cause. It
14 wasn't consistent with the flawed information from
15 Dr. Edge who, by the way, had been up for two days,
16 spoke with these officers for two minutes, disputes what
17 they attribute to him.

18 THE COURT: He disputes the word murdered but
19 he doesn't dispute that he had a concern. He relayed
20 the concern to the authorities. What do you expect the
21 police to do? They have to investigate.

22 MR. KLEIN: They do but they don't have to --

23 THE COURT: They didn't make this up out of
24 whole cloth.

25 MR. KLEIN: Well, the part with Mr. Thomas

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1 I -- we will show at trial, Judge, if the Court will
2 allow, what the Court of Appeals laid out as -- and we
3 think should be the law of the case.

4 THE COURT: Let's talk about that for a
5 moment. I mean, that's not the rule of the Second
6 Circuit law. You know, it's not how is it the
7 collateral estoppel?

8 MR. KLEIN: Judge, we think that the -- the
9 issues was squarely litigated.

10 THE COURT: Was -- by whom?

11 MR. KLEIN: By Mr. Thomas and by the -- you
12 know, the District Attorney on behalf of the --
13 defending the conduct of the police.

14 THE COURT: Well, the police weren't
15 represented at that hearing.

16 MR. KLEIN: Well, the -- their conduct -- they
17 were, in essence, represented by the prosecutors.

18 THE COURT: But that's not what the Second
19 Circuit says. Right? Just read *Jenkins versus City of*
20 *New York*. Detectives Maxshine, Shulman and Hunter and
21 Parrino were witnesses in but not parties to Jenkins'
22 criminal proceeding. The detectives are no more in
23 privity with the state than the city was in Brown;
24 therefore, it was error for the district court to
25 preclude the defendants from asserting that they had

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1 probable cause to arrest Jenkins.

2 So, clearly if Mr. Thomas had lost the issue,
3 that would be res judicata against him because he was
4 there, he litigated it, he had the opportunity, but not
5 against the police officers who were not parties to the
6 proceeding.

7 So it's a defense abuse of collateral
8 estoppel. You can't use it in an offensive manner in
9 this circumstance I don't believe once unless you can
10 find --

11 MR. KLEIN: We cite the Owens versus Treder
12 case, Second Circuit 1989.

13 THE COURT: Yes, and that case involves the
14 determination against the plaintiff who is a party to
15 the proceeding. It's not against the -- it's not
16 against the -- the police officers.

17 MR. KLEIN: Well, I think that there is
18 privity in the District Attorney. I -- you know, the
19 police were represented, in essence, by the state in
20 that case. They were defending their conduct and
21 litigated the constitutionality of it.

22 THE COURT: If I made that ruling, it would
23 take a split second for the Second Circuit to reverse
24 me, which they do like to do.

25 MR. KLEIN: Which I don't want them to do.

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1 THE COURT: No.

2 MR. KLEIN: None of us do.

3 THE COURT: It may not be a huge issue but --
4 and that's why I asked Rhiannon with regard to it. They
5 are not taking the position that they concede that this
6 was coercive in nature. Obviously the Court of Appeals
7 made the decision but I don't think it's binding upon --
8 on the individual detectives who were not party to that
9 proceeding.

10 MR. KLEIN: Well, Judge, even if you find that
11 it's not, which we hope that you do in a way that won't
12 be reversed on appeal, the -- the -- there clearly are
13 questions of fact here. The plaintiff denies that he
14 engaged in any crime for all the reasons set forth in
15 that decision. The dozens of times that -- in other
16 words, he was there for -- not just the first two hours
17 after being hospitalized for -- after expressing an
18 intent to kill himself because he was so distraught, he
19 was hospitalized for 12, 14 hours, I believe.

20 He's then picked up by one of the defendants
21 and taken back right to this interrogation room, with
22 his child still in the hospital and what condition he
23 didn't know at that point, cut off from his family, and
24 even more distraught, sleep deprived and all of that.
25 And also there was circumstances that Your Honor pointed

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1 out about his mental state, his ability to comprehend
2 that I think the jury would have to evaluate, and he --
3 he -- and even there, the defendants concede for the
4 next several hours until I believe Defendant Colanari
5 comes in the room, up until that point he maintained
6 that he didn't do anything wrong, and they didn't have
7 probable cause. It was only when there was
8 this additional threat for, you know, I'll call it, that
9 he was so distraught, so ready to -- to, you know, told
10 so many times you'll leave, we will let you go, you're
11 not in trouble. You know, we need you to --

12 Making all these threats to his vital
13 interests, which were set forth in the Court of Appeals
14 decision -- his wife, his family, his overall
15 well-being, his kid's survival -- did he give them what
16 they suggested to him dozens and dozens of times and
17 they concede in their testimony that after the Court of
18 Appeals decision in this case, that everything that the
19 Court of Appeals found with regard to their -- their --
20 their conduct was accurate.

21 Yes, we -- we -- he did not say any of these
22 facts before we fed them to him and so these questions
23 of fact are profound. There may be questions about
24 whether they should -- I don't think -- well, let's say
25 this. I don't know that anyone would disagree that if

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1 Dr. Edge rightly or wrongly expresses a concern that
2 there was some acceleration or deceleration of injury,
3 which is disputed that they would have a right to look
4 into it.

5 The question is whether they coerced a false
6 confession creating fabricated evidence as well as
7 maliciously prosecuting the plaintiff. Those are
8 questions of fact that can't be resolved on summary
9 judgment as well as qualified immunity.

10 THE COURT: How do we deal with the fact that
11 we have five judges in the appellate division who looked
12 at this and they're experienced judges -- Malone,
13 Spain -- all these judges I know looked at this and said
14 this is not impermissible.

15 MR. KLEIN: Well, I don't know them as well as
16 you do, Judge, but I think, you know, there is -- these
17 are invalidated decisions. So I'm not sure that we need
18 to concern ourselves with that here and that they are --
19 they are not binding decisions. I think as you pointed
20 out, I'm not aware of -- of the standard of giving the
21 defendants a free pass on immunity because state court
22 decided, you know, and ultimately improperly in their
23 favor. Courts make mistakes, respectfully, all the time
24 and -- and --

25 THE COURT: If you are going to say -- I guess

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1 this is another area, the qualified immunity is supposed
2 to protect all, plainly. You've got five judges with
3 law degrees who felt that what they did was appropriate.

4 How can you say that the police officers
5 then -- that they knowingly violated the law? That a
6 reasonable police officer would have known that they
7 were -- knowingly violated the law when judges on the
8 appellate division felt that they didn't?

9 MR. KLEIN: Well, because I think that the
10 police officers' conduct was misleading, and I think the --
11 thank God the Court of Appeals got it right. But I
12 think --

13 THE COURT: It's not -- it's not misleading in
14 the sense that -- I mean, it was videotaped. So they
15 knew what it was. They're not -- they didn't lie about
16 it. They didn't go in and say we never asked him any
17 leading questions. He just blurted it out in the first
18 five minutes. It wasn't -- that's not what you're
19 saying, right?

20 MR. KLEIN: No, but the fact that it was --
21 what they did, Judge, was -- I think there was
22 discussion about briefs in the Court of Appeals about
23 how these are tried and true techniques.

24 The testimony in this case is not that there
25 were any tried and true techniques used. The evidence

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1 at trial will show, Judge, and I think before the Court
2 in this motion, that Detective Fountain, the lead here,
3 was a juvenile officer and that this was his first, I
4 believe, murder case and that he jumped in after going
5 to one -- a couple of hour training session on
6 interrogations, and he didn't remember the details of
7 that at that time and basically went on instinct and
8 intuition and that his colleagues went along with it.

9 And that they basically went to such lengths
10 that -- threatening interests, threatening in such a way
11 that were clearly established to reasonable police
12 officers that -- and --

13 THE COURT: Clearly established by what
14 federal case as of 2006? In other words, if I were to
15 ask you give me your four best cases that would put a
16 police officer on notice, which cases would you rely
17 upon?

18 MR. KLEIN: I'm probably going to have to ask
19 you to let me send you a letter or follow up because we
20 have thousands of pages of materials we are using and
21 just don't have it off the top of my head to quote for
22 you.

23 THE COURT: Okay.

24 MR. KLEIN: But I think it's obvious that --
25 and the -- for the reasons in the Court of Appeals

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1 decision that the threats made in this case, the
2 information created --

3 THE COURT: The Court of Appeals decision was
4 after the fact. So we are talking about what a
5 reasonable officer would have known at the time that
6 they did it. They didn't have the benefit of the judges
7 of the Court of Appeals years later.

8 MR. KLEIN: Right. The police officers had
9 notice -- this is the -- I can think of a case that I
10 had in the Eastern District where Judge Chen denied
11 summary judgment on a case where the police were looking
12 for individuals who shot at them, and they obtained a
13 statement from a -- a purported witness that was alleged
14 to have been coerced and they said this was what the
15 witness told us and we relied on it, and the Court found
16 that that created a -- that -- that coercion created a
17 question of fact whether they created fabricated
18 evidence that was used to commit -- a prosecutor can
19 deprive a defendant of his liberty.

20 THE COURT: I will give you time to submit, a
21 week or two weeks. I want to make sure I get this right
22 but I have to concentrate on what was clearly settled
23 law at the time and how much of an on-force case do I
24 need? Obviously that's a -- a shifting sands, depending
25 upon the Court of Appeals decision I read with you.

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1 MR. KLEIN: Right. Because there's --
2 there's, you know -- there's a lot of cases where it
3 doesn't have to be specifically that holding for the
4 Court to find that there's -- as long as they are on
5 notice. But, Judge, I would say this in this case, the
6 evidence was that Adrian Thomas was involved was in fact
7 created by the officers. They had no evidence.

8 THE COURT: He was the custodial parent who
9 had -- with the child when -- when the child became
10 sick.

11 MR. KLEIN: The mother was as well but they
12 zoomed in on him and -- and immediately removed him from
13 the home to headquarters and started with their tell us
14 what happened, tell us -- we know you did this. The
15 doctor told us this baby was hit with a force of a bus.
16 You know, if you want to save his life, you've got to
17 tell -- if you want to see your wife, if you want to go
18 home, you know, you're not in trouble. Just tell us.
19 And they wore this man down.

20 And so I think that -- that the creation of
21 this false, fabricated evidence, which is at this stage
22 the Court should has to credit as in the light most
23 favorable to the plaintiff, this was a coerced false
24 confession with evidence created by these officers who
25 concede.

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1 THE COURT: You're using the word coerced and
2 false interchangeably. You can have a coerced
3 confession and it could be true.

4 MR. KLEIN: Correct. This is a coerced and
5 false confession. He -- it was coerced. We think for
6 the reasons set forth in the Court of Appeals decision
7 that we have -- the officers concede that they suggested
8 all of the incriminating facts to plaintiff before he
9 ever said them independently.

10 And, two, that these facts were false. The
11 plaintiff denies them, his expert validates that this
12 is exactly what happened here, and we think will -- you
13 know, can -- can convince a jury that more likely than
14 not that this was a coerced false confession and at
15 least are questions of fact.

16 THE COURT: Do you concede that the point when
17 the judge allows a confession in that that breaks the
18 causal chain?

19 MR. KLEIN: I don't. I think we are talking
20 about Townes -- my understanding of Townes is it's a --
21 it's a case where someone was seeking damages for
22 malicious prosecution based on a bad stop and so, if I
23 recall correctly, the person was in the back of the cab
24 and had a gun.

25 THE COURT: Yes.

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1 MR. KLEIN: And so it was probable cause to --
2 grounds to -- or to arrest that person even --

3 THE COURT: No grounds to stop.

4 MR. KLEIN: To stop. And so the individual
5 sought to benefit from the fruit of the poisonous tree
6 in seeking damages for a bad stop, and the Court said no
7 once that gun is recovered, we have grounds to prosecute
8 you.

9 THE COURT: But the Court also said -- and I
10 agree with what you said there. The Court also said
11 separately and independently that once -- when the judge
12 makes a determination to allow it in, that's a
13 superseding intervening cause and that cuts the causal
14 chain. So that would end any type of damages at that
15 point.

16 MR. KLEIN: I think -- that's, I think, a
17 different scenario where someone is seeking damages.
18 Yeah, I -- I -- my understanding is that the -- the --
19 the defendants' conduct reasonably and foreseeably
20 resulted in plaintiff being, you know, a -- a court
21 adopting this coerced false statement. And so I don't
22 see how that can insulate them from the reasonable and
23 foreseeable consequences of their misconduct.

24 THE COURT: Well, because -- as long as they
25 don't lie to the judge. In other words, if they

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1 don't -- you know, say we brought him in and he
2 voluntarily wrote this down in three minutes and we
3 never asked him a single question. All right?

4 MR. KLEIN: Never threatened him and the
5 threats are on tape or --

6 THE COURT: As long as a judge is making an
7 independent decision. If he makes a decision to allow
8 that into evidence and he's wrong about that, he should
9 have suppressed it but he did not, that is a superseding
10 and intervening cause by definition. But let me --

11 MR. KLEIN: If I could just make one final
12 point.

13 THE COURT: Yes.

14 MR. KLEIN: I think that what's different here
15 is this bias cascade that continues even after the
16 confession is suppressed, is thrown out by the Court of
17 Appeals.

18 THE COURT: Let me ask you this question: Why
19 didn't the Court of Appeals, if they suppressed a
20 confession, there's no probable cause for the
21 prosecution, why didn't they dismiss the case at that
22 point in time rather than set it down to be retried?

23 MR. KLEIN: I don't know that they went to the
24 question of probable cause. I think the motion was just
25 on the -- on the suppression. So I'm not sure of the

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1 logistics of that, whether the Court had that authority
2 or whether the Court weighed that or not. But my
3 understanding is that the Court did not make any
4 determination of probable cause. It just made a
5 determination that the -- the motion to suppress should
6 have been granted and -- and sent it back to the trial
7 court for further proceeding.

8 We don't think he should have been
9 re-prosecuted in the absence of any evidence linking him
10 to it, but that was part of the bias cascade in this
11 case.

12 Dr. Sikirica stuck to his theory, even in the
13 absence of the information that was given to him with --
14 within hours of the -- of the coerced false confession
15 being created, and he writes blunt-force trauma on the
16 death certificate, doesn't issue his autopsy for months
17 and months and months later and goes to a grand jury and
18 reports that to this theory that only came about via the
19 suggestions and coerced statements made by the
20 defendants.

21 THE COURT: What's the proof of that? It
22 seems that Dr. Sikirica did an autopsy and made his
23 conclusion, which some other doctors agree with and some
24 others disagree.

25 MR. KLEIN: Others agree I think who are not

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1 experts in the case. After the fact maybe the -- the
2 neurologist was asked in a deposition what do you think
3 about this? People -- I think there's a credibility
4 issues about --

5 THE COURT: Do you have an expert opinion to
6 say that the doctor committed malpractice in that
7 determination?

8 MR. KLEIN: In -- in essence, I don't think
9 the question of malpractice was asked of Dr. Maloney.
10 The deputy county medical examiner for Erie County,
11 New York, is our expert in this case, and she says
12 flat-out that this -- there's no evidence of trauma,
13 that this was sepsis leading to meningitis that resulted
14 in the -- the swelling and bleeding and -- and evidence
15 of subdural collection in the brain and that
16 Dr. Sikirica was flatly wrong.

17 There are post hoc questions or expert reports
18 from the defense but at this stage, yes, the plaintiff
19 does submit that that was flatly wrong, and combined
20 with the testimony of Doctor -- of plaintiff's
21 confession expert squares -- supports the inference that
22 can only be decided by a jury that this was a cascade, a
23 bias cascade. Started with this premise that there
24 was a homicide, and whether that was right or wrong, the
25 defendants then endeavored to get plaintiff to, you

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1 know, sign a coerced false confession that was then
2 shared with Dr. Sikirica, who then issues a cause of
3 death determination that's at odds with what our expert
4 says the evidence shows.

5 So we do think there are credibility issues
6 that can only be resolved at trial.

7 THE COURT: Okay. All right. Why don't --
8 I'm going to take a break for a couple of minutes just
9 to talk with my staff, and we will come out and finish
10 this one and move on to the next one. If you want to
11 take a break and get a drink of water or something, feel
12 free.

13 MR. KLEIN: Thank you.

14 (Pause in proceeding, 11:58 a.m.)

15 (Following recess, 12:10 p.m.)

16 THE COURT: Before I get the decision over to
17 Davis-Guider, any further arguments that anyone wants to
18 make that I haven't heard from? Pretty extensive brief.
19 This one goes along. All right. Not hearing anything.

20 So -- and obviously for purposes of this oral
21 argument, I have heard -- we talked about general
22 principles of the law that are generally applicable to
23 coroners and police officers, so we probably don't need
24 to repeat that except as to the specifics. But why
25 don't I -- I'm going to turn to the City and just have

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1 them summarize what your argument is in this case.

2 MS. GIFFORD: Thank you, your Honor. The
3 City's position in this case --

4 THE COURT: Before you do, I'll just call a
5 different case. So, with regard to this matter, we
6 talked a little bit about giving plaintiff's counsel and
7 defense counsel a short period of time if you want to
8 submit to me. What I'm looking for particular cases
9 that deal with what was clearly established at the time
10 of this interrogation from a federal point of view that
11 you want to rely upon.

12 I'm not looking for hundreds of them but you
13 have three or four that are your best cases at the time,
14 Mr. Klein, can you do that within a week or so?

15 MR. KLEIN: Yes.

16 THE COURT: All right. So seven days. And
17 how about defense counsel? Can I get those within a
18 week -- unless you want to rely upon what's in your
19 brief.

20 MR. GINSBERG: To the extent that those cases
21 don't appear in the plaintiff's brief, we would like an
22 opportunity to at least see them and then respond to
23 them before the defense would have to submit.

24 THE COURT: You made the motion for qualified
25 immunity. So it's your obligation to tell me what the

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1 clearly established law was at the time. So we will
2 just ask for whatever you give me.

3 MR. GINSBERG: Certainly, your Honor.

4 THE COURT: Okay. Same for the --
5 Dr. Sikirica.

6 MR. FIRTH: Yes.

7 THE COURT: It may not be an issue with regard
8 to this whole issue of -- the confession is separate
9 from what your issue is?

10 MR. FIRTH: That's correct, your Honor.

11 THE COURT: All right. So, feel free. I just
12 want to give you an opportunity with regard to that. So
13 that marks the end of the oral argument in the first
14 case and then going to transition over to the Michael
15 Davis-Guider case.

16 (Proceeding concluded.)

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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/s/ Lisa L. Tennyson

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